RE: MAT SARI BIN HAMID EX PARTE UNITED ASIAN BANK BHD.

HIGH COURT, KUALA LUMPUR
TUAN T. SELVENTHIRANATHAN JC
[BANKRUPTCY NO. D5-29-4110-91]
22 FEBRUARY 1992

BANKRUPTCY: Creditor's petition - Application for adjournment by debtor on the grounds that an application had been filed to set aside the judgment in default on which the bankruptcy proceedings were founded - Adjournment refused - Lack of bona fides on the part of the debtor - Section 93(2) Bankruptcy Act 1967 - Rule 127 Bankruptcy Rules 1969.

The debtor applied for an adjournment of the hearing of a creditor's petition on the ground that an application had been made to set aside the judgment in default which had been obtained and on which the present bankruptcy proceedings had been founded.

The petitioning creditor objected to the application on the ground that judgment in default had been obtained after the writ of summons had been served personally on the debtor. Further more than four years had elapsed since judgment in default had been entered and more than four months had passed since service of the bankruptcy notice whereas the application to set aside the judgment was only made the day before the hearing of the petition.

Held:

[1] The debtor's application was an attempt to delay the making of the orders sought by the petitioner and bereft of *bona fides* on the part of the debtor, which did not justify an adjournment of the proceedings.

Obiter: The debtor could apply to the Official Assignee under s. 38(1)(a) Bankruptcy Act 1967 for sanction to maintain his application to set aside the judgment in default of appearance and if successful could apply to court under s. 92(1) Bankruptcy Act 1967 to rescind its orders.

[Application for adjournment refused. Receiving and adjudicating orders made against the judgment debtor.]

Case referred to:
Re Mat Shah bin Safuan, ex-parte United Asian Bank Bhd. [1991] 2 MLJ 48 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967 ss. 3(1), 38(1)(a), 92(1), 93(2)
Bankruptcy Rule 1969, r. 127

For the petitioning creditor - J. Kannaperan; M/s. Shearn Delamore & Co.
For the judgment debtor - Venu Nair; M/s. Venu Nair & Co.

JUDGMENT

T. Selventhiranathan JC:
This creditor's petition for receiving and adjudication orders in respect of the estate of the debtor who is indebted to the petitioning creditor in the sum of RM5,712,370.11 being the amount due on the final judgment together with interest and costs obtained by the creditor on 2 July 1987, was presented on 21 August 1991 and served personally on the debtor on 29 October 1991.

When the petition was heard before me on 7 January 1992, Encik Venu Nair for the debtor applied for an adjournment on the ground that an application had been made to set aside the judgment in default which had been obtained and on which the present bankruptcy proceedings had been founded. The application had been filed and served on the petitioning creditor.

Cik J Kannaperan for the petitioning creditor objected on the ground that the judgment in default had been obtained on 2 July 1987 after the writ of summons had been served personally on the debtor (defendent) on 8 June 1987. The bankruptcy notice dated 31 July 1991 had been served personally on the debtor on 14 August 1991. More than four years had elapsed since judgment in default had been entered and more than four months had passed since the service of the bankruptcy notice whereas the application to set aside the judgment in default had only been made the day before, that is on 6 January 1992.

Encik Venu Nair replied that the debtor only became aware of the judgment in default at the end of August 1991. The creditor's petition was served in October 1991. In the circumtances, he asked the court to exercise its discretion under r. 127 of the Bankruptcy Rules 1969 ("the Rules") and grant an adjournment until

the application to set aside the judgment in default had been heard.

I refused to grant the application for adjournment and proceeded to make receiving and adjudicating orders as prayed for in the petition. I considered the application for adjournment as an eleventh - hour attempt to stave off the making of the orders. The debtor (defendent) was **personally served** with the writ of summons in question on 8 June 1987. The copy of the judgment filed with the request for the issue of the bankruptcy notice shows that **judgment in default of appearance** was entered against the debtor (defendant) on the 2 July 1987, some four years before the institution of the proceedings herein. A bankruptcy notice containing the terms of s. 3(1) (i) of the Bankruptcy Act 1967 ("the Act") in the prescribed form and stating the consequences of non - compliance therewith was also served personally on the debtor on 14 August 1991; and it was only then, according to his Counsel, that the debtor first became aware of the judgment obtained against him. It is observed that the judgment obtained was in default of appearance and he would have had ample notice in clear and unambiguous language in the writ of summons served on him personally of the consequences of not entering appearance. However, he took no steps to set aside the judgment in default of appearance until the very day before the hearing of the petition. This to mind was clearly an attempt to delay the making of the orders sought and bereft of *bona fides* on the part of the debtor, which did not justify an adjournment of the proceedings under s. 93(2) of the Act or r. 127 of the Rules. In making the orders sought, I was futher fortified in my viev by the decision of Siti Norma Yaacob J in *Re Mat Shah bin Safuan, ex parte United Asian Bank Bhd.* [1991] 2 MLJ 48 where at page 50 she said:

> Under s. 6 (2) of the Act, once the debt of the petitioning creditor and the act or acts of bankruptcy complained of have been proved to the satisfaction of the court, a receiving order will be made in pursuance to the petition. In this case all the requirements have been fulfilled and pursuant to para 1 of the petition, I am empowered to make a receiving order against the debtor. Under r. 150 (1) when a receiving order has been made, any creditor or the Offical Assignee may apply to the court to adjudge the debtor bankrupt. In the case the judgment creditor orally applied to have the debtor adjudge a bankrupt and I had in deference to the debtor's objection adjudged him so as s. 5(1) and s.150 (2) do not prohibit me from making such an adjudication order. These provisions merely set out the procedures to be followed after a receiving order has been made and they are merely the administrative acts of the Offical Assignee and have nothing to do with the jurisdiction of the court to adjudicate a debtor a bankrupt under r.150 (1) on the oral application of the judgment creditor, following the making of a receiving order on him.

However, the debtor is not without recourse in this situation. He could apply under s. 38 (1)(a) of the Act to the Offical Assignee for sanction to maintain his application to set aside the judgment in default of appearance (which sanction should be readily forthcoming as assured by Encik Sharifuddin, Assistant Offical Assignee, who was persent in court) and, if he succeeds in that application, then apply to the court under s. 92 (1) of the Act to rescind its orders.